STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

LINDITA PIRGU, Guardian and Conservator of the Estate of Feridon Pirgu, a Legally Incapacitated Individual, Plaintiff-Appellant,	Supreme Court No. _____
v.	Court of Appeals No. 314523
UNITED SERVICES AUTOMOBILE ASSOCIATION, parent company of USAA INSURANCE AGENCY, INC., doing business In the State of Michigan as a foreign profit corporation; and in the State of Texas as a domestic for-profit corporation,	Oakland Circuit Court Case No. 09-1300-CK
Defendant-Appellee.	

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

Contents

INDEX OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT REGARDING (1) PROCEDURAL POSTURE, (2) OPINION APPEALED FROM, (3) JURISDICTION, (4) GROUNDS FOR RELIEF, AND (5) RELIEF SOUGHT

Procedural Posture

Plaintiff-Appellant ("Plaintiff") brought this action for no-fault insurance benefits. After trial, on January 9, 2013, the circuit court entered an order that resolved all pending claims and closed the case pursuant to MCR 2.602(A)(3).

The order provided ("Judgment," App. A):[1]

1. Plaintiff is entitled to payment of $54,720.00 for attendant care benefits; $7,992.00 in wage loss benefits, and $7,525.44 in no-fault penalty interest for a total of $70,237.44 from Defendant. (Judgment, ¶ 2, App. A)

2. No other benefits were or are due from Defendant to Plaintiff, and Plaintiff shall not be entitled to any PIP benefits in the future arising from the subject accident of October 15, 2008. (Judgment, ¶ 2, App. A)

3. Plaintiff's motion for reconsideration regarding expenses incurred or paid to the Findling Law Firm or Darren Findling was denied. (Judgment, ¶ 3, App. A)

4. Plaintiffs Motion for no fault penalty attorney fees was granted, with Plaintiff awarded $23,412.48 for the reasons stated on the December 19, 2012 record. (Judgment, ¶ 4, App. A)

5. Plaintiff was awarded costs of $5,273. (Judgment, ¶ 5, App. A)

6. Judgment interest of $3,732.14 was awarded (to date). (Judgment, ¶ 6, App. A)

[1] Judgment On Jury Verdict and Order Regarding Plaintiff's Motion for Entry Of Judgment, Motion for Reconsideration, Motion for Entry of Judgment Notwithstanding the Verdict, Motion to Strike Jury Question Relating to Future Benefits And Motion For Costs, Attorney Fees and Interest, January 19, 2013 (hereafter "Judgment," App. A)

7. Plaintiff's motion for judgment n.o.v. was denied for the reasons stated on the December 19, 2012 record. (Judgment, ¶ 7, App. A)

Plaintiff-Appellee filed a timely claim of appeal on January 30, 2013. The Court of Appeals, on December 16, 2014, issued its opinion, *Pirgu v United State Automobile Association*, unpublished per curiam opinion (Mi.Ct.App. No. 314523, 12/16/2014) ("Opinion," App. B), accompanied by Judge Gleicher's opinion, concurring in part and dissenting in part ("Dissenting Opinion," App. C).

Order Appealed From

Plaintiff seeks leave to appeal from the Court of Appeals Opinion, App. B.

Jurisdiction

The Oakland Circuit Court had original subject matter jurisdiction in this matter because the amount in controversy exceeded $25,000. On January 9, 2013, the circuit court entered an order that resolved all pending claims and closed the case pursuant to MCR 2.602(A)(3). Plaintiff filed a timely claim of appeal on January 30, 2013. The Court of Appeals had jurisdiction pursuant to MCR 7.202(6)(a)(i) and MCR 7.203(A)(1). This Court has jurisdiction to review this Application for Leave to Appeal. MCR 7.301(A)(2). This application will be timely filed within 42 days of the Court of Appeals' decision. MCR 7.302(C)(2)(c).

Grounds for Relief

Under the No-Fault Act, attorney fees "shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). Two opinions from this Court regarding attorney fees are routinely cited: *Wood v DAIIE*, 413 Mich. 573, 588, 321 N.W.2d 653 (1982), and *Smith v Khouri*, 481 Mich. 519, 751 N.W.2d 472 (2008). In *Wood*, this Court addressed attorney fees under the No-Fault Act. In *Smith*, the attorney fees arose as case evaluation sanctions under MCR 2.403(O), and this Court held that the trial court "should begin the process of calculating a reasonable attorney fee by determining factor 3 under MRPC 1.5(a), *i.e.*, the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence." *Id.*, 522. Then, "his number should be multiplied by the reasonable number of hours expended." *Id.* This Court concluded, "This will lead to a more objective analysis."

The majority below, J. Gleicher dissenting, determined that the *Smith* analysis did not govern an award of attorney fees under the No-Fault Act. Opinion, 3-4, Dissenting Opinion, *passim*.

Two published decisions from the Court of Appeals reach opposite conclusions regarding attorney fees under the No-Fault Act. In *Univ Rehab*

Alliance, Inc v Farm Bureau General Ins Co of Michigan, 279 Mich.App. 691, 700 n 3, 760 N.W.2d 574 (2008), the trial court awarded an attorney fee predicated upon the contingent fee contract. The Court of Appeals affirmed, holding that a fee per hour and number of hours expended method is not required. To the contrary, in *Augustine v. Allstate Ins Co,* 292 Mich.App. 408, 429, 807 N.W.2d 77 (2011), the court held that *Smith* is the proper standard to be applied in cases brought pursuant to MCL 500.3148(1) when a party seeks hourly attorney fees.[2]

This appeal presents the opportunity for this Court to clarify whether the trial court should initiate its consideration of No-Fault Act attorney fees with focus on the reasonable hourly (or daily rate) and the reasonable number of hours expended. Without doubt, "the issue involves legal principles of major significance to the state's jurisprudence," as contemplated by MCR 7.302(B)(3).

Relief Sought

Plaintiff requests that this Court reverse the Court of Appeals [majority] Opinion regarding attorney fees and remand this matter for a fee hearing conducted pursuant to *Smith*.

[2] *Augustine* distinguished *Univ Rehab Alliance* on the basis that the plaintiff in *Univ Rehab Alliance* sought compensation predicated upon the contingency fee agreement whereas the plaintiff in *Augustine* sought recovery of attorney fees on an hourly basis rejecting her own contingency-fee award. Pertinent to this application, there is no doubt that *Augustine* embraced the hourly fee multiplied by expended hours methodology, where the plaintiff requests a fee under that basis. Additionally, a fair reading of *Augustine* makes clear that the court's reliance on *Smith* was not mere dicta. Rather, the court relied both on *Smith* and the doctrine of the law of the case.

STATEMENT OF QUESTION PRESENTED

In Assessing the No-Fault Attorney Fee, the Trial Court Engaged in No Genuine Review of the Hours Expended and No Genuine Review of the Applicable Hourly Rate. Instead, the Trial Court Awarded an Attorney Fee that was One-Third of the Jury Award.

Did the Trial Court Reversibly Err by Failing to Apply the Criteria Demanded by Michigan Law to Determine the No-Fault Attorney Fee?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "No."

The Court of Appeals answered "No."

The trial court answered "No."

STATEMENT OF FACTS

Plaintiff-Appellant Lindita Pirgu (Plaintiff) is the guardian and conservator of the Estate of Feridon Pirgu, a legally incapacitated individual. "In October 2008, plaintiff Feridon Pirgu was struck by a car while riding his bicycle" sustaining "skull and orbital fractures and brain bleeding" and "emerg[ing] from his hospitalization with a closed head injury diagnosis." Dissenting Opinion, 1, App. C. The Michigan Assigned Claims Facility called upon Citizens Insurance Company to administer the claim. *Id.* Citizens paid Pirgu "a panoply of benefits including for attendant care, replacement services, and wage loss while concomitantly pursuing a declaratory judgment action contending that defendant United States Automobile Association (USAA) bore primary liability. *Id.* Eventually, Defendant-Appellee USAA ("Defendant") was found to be responsible; it immediately cut off Plaintiff's benefits for attendant care, replacement services, and wage-loss. *Id.*

Upon Defendant's denial of Plaintiff's claim to no-fault benefits, Plaintiff filed this cause of action for no-fault benefits. The matter went to trial. The jury found injury, causation, and damages. (Tr, 11/2/12, pp. 108-113)

> JUROR: Okay. We, the jury, make the following answers to the questions submitted by the Court:

Question number 1:

Did the plaintiff's Estate and (sic) accidental bodily injury, on October 15th, 2008?

Answer: Yes.

Question number 2:

As of October 1st, 2010, was the plaintiff still suffering from any injuries sustained in the October 15th, 2008 accident?

Answer: Yes.

Question number 3:

Were allowable expenses incurred by or on behalf of the plaintiff, after October 1st, 2010, arising out of accidental bodily injury, referred to in question number 2?

* * *

Answer: Yes.

Question number 4:

Were allowable expenses incurred by or on behalf of the plaintiff, after October 1st, 2010, arising out of accidental bodily injury, on 10-15-08, for attendant care?

Answer: Yes.

Question number 5:

What hourly rate do you find is reasonable for attendant care service provided?

Answer: $12.00 per hour.

Question number 6:

How many hours per day for attendant care do you find was reasonable?

Answer: Six hours per day.

Question number 7:

What is the amount of allowable attendant care owed to the plaintiff * * * -- please, state the total amount.

Answer: $54,720.00.

* * *

For work loss, question number 13:

Did the plaintiff sustain work loss, after October 1st, 2010, arising out of the accidental bodily injury, caused on 10-15-08 accident?

* * *

Answer: Yes.

Part B of that:

If your answer is yes, what is the amount of work loss owed to the plaintiff, from October 1st, 2010, include only the work loss not already paid by the defendant.

The amount is $7,900 -- $7,992.00.

* * *

Question number 15, regarding interest.

* * *

Part A: The answer is yes.

Part B:

If the answer is yes, what is the amount of interest owed to the plaintiff on overdue benefits, include only the interest not already paid by the defendant.

And the amount was $7,525.44

And that was it.

After the trial, Plaintiff filed two motions: (1) Motion for Reconsideration of Ruling on Directed Verdict Related to Attorney Fees for Service of Guardian and Conservator, dated November 26, 2012, and (2) Plaintiff's Motion for Entry of Judgment, Motion for Judgment Notwithstanding Verdict, Motion to Strike Jury Question Relating to Future Benefits, Motion for Costs, Attorney Fees and Interest, dated November 27, 2012 (hereafter "Nov. 27 Motion").

The motion for reconsideration (11/26/12) maintained that attorney fees for the aid of the guardian or conservator are permissible no-fault benefits – not a subject of this application for leave to appeal.

Plaintiff's Nov. 27 Motion raised several issues, some of which require little discussion. Plaintiff requested entry of a judgment and presented computations for costs, attorney fees, and statutory interest. The subject of attorney fees is fully discussed *infra*.[3] Other aspects of the motion are not raised in this application.

Pertinent here, Plaintiff requested entry of judgment, inclusive of his bill of costs, attorney fees, and statutory interest.[4] *Id.*, 5. Defendant contested the bill of costs, *id.*, pp. 6-11, and the attorney fees, *id.*, pp. 11-13. The trial court first ruled regarding the billed costs, *id.*, pp. 7-11 (raising no issue on appeal).

With regard to attorney fees, the trial court first rejected Defendant's argument that there was no showing that Defendant's failure to pay was unreasonable. The court then held that Plaintiff's attorney fee should be one-third of the jury verdict. *Id.*, pp. 12-14.

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[3] Briefly, Plaintiff's attorney attached a spreadsheet describing the hours that he expended and proposed an hourly rate, requesting attorney fees of $220,945.

[4] The jury had computed no-fault interest in its response to jury verdict question no. 15. (Tr, 11/2/12, p. 113)

Plaintiff raised the issue of attorney fees on appeal. The complete transcript of the trial court's deliberations on the amount of the attorney fee follows. *Id.*, pp. 11-14.

> [p. 11] THE COURT: Well, the jury made the determination
>
> MS. BROWN: Yes, and --
>
> THE COURT: -- that he wasn't entitled to everything he's asked for but there was an amount that he [p. 12] should have received and he didn't.
>
> Now, I think he should get attorney fees on that amount.
>
> MS. BROWN: All right. And that amount was $54,792.00, I believe --
>
> THE COURT: So if you give him a third of that --
>
> MS. BROWN: Right.
>
> MR. SHULMAN: Your Honor, there's no way possible to separate out how much time was spent to recover the six hours a day of attendant care --
>
> THE COURT: How much are you asking for, counsel?
>
> MR. SHULMAN: $220,000.00.
>
> THE COURT: No, total, at trial, what were you asking for?
>
> MR. SHULMAN: It was about $200,000.00.
>
> THE COURT: Oh, it's more than that, it was a lot more than that.
>
> MR. SHULMAN: No, your Honor, at $12.00 an hour it was about $200,000.00 --
>
> THE COURT: I'm talking about the total award, what were you asking for?
>
> MR. SHULMAN: I just gave the jury a couple alternates based on whether they were going to award [p. 13] $12.00 an hour or $20.00 an hour --
>
> MS. BROWN: It was over $400,000.00.

MR. SHULMAN: That's -- that's not true.

MS. BROWN: It was $20.00 an hour, 24 hours a day, for two years --

MR. SHULMAN: It would have -- your Honor, there's no way to separate out what amount was used -- what amount of the testimony was necessary for a portion of the award --

THE COURT: The jury, though, found --

MR. SHULMAN: -- this was an all or nothing proposition --

THE COURT: I -- I know but the jury also found that it was not unreasonable (sic), you didn't get nearly what you asked for --

MR. SHULMAN: The --

THE COURT: -- you got less than what, one-third --

MR. SHULMAN: Your Honor, the jury ruled that the benefits were overdue.

The case law supports --

THE COURT: -- counsel, I'm going to give you one-third of the 54,000, is that what it was, 54?

I think --

MS. BROWN: Well, it -- actually, all told, it [p. 14] was 54,000 for attendant care, it was seven thousand --

THE COURT: -- that's 61,000

(Indiscernible)

MS. BROWN: -- interest.

THE COURT: It's about 25,000.

MR. SHULMAN: Your Honor, a contingent fee isn't -- isn't proper in this case because it's -- it's --

THE COURT: Do you want me to give you less than that?

MR. SHULMAN: Of course not, your Honor.

THE COURT: Okay. Then that's what you're getting.

Plaintiff's attorney, upon receiving permission, made a record regarding the trial court's award of no-fault attorney fees. *Id.*, 27-31. The trial court confirmed his prior ruling on no-fault attorney fees. *Id.*, 31.

On January 9, 2013, the circuit court heard further arguments, framed by conflicting proposed judgments. (Tr, 1/9/13, p. 3) The parties discussed taxed costs and statutory interest, subjects not raised in this appeal. *Id.*, 4-6.

Additionally, the parties discussed the proper computation of the attorney fee that the circuit court had allowed. Defense counsel, Ms. Brown, noted that the circuit court had awarded an attorney fee of one-third of the jury award. *Id.*, 6. "Your Honor awarded one-third of the amount awarded by the jury. The jury awarded a total of $70,237.44, one-third of that is what's in my judgment, which is $23,178.36." *Id.* Eventually, there was agreement as to the computation of the dollar amount, *id.*, 6-9, which is not, *per se*, an issue in this appeal. However, Plaintiff proposes that the circuit court committed reversible error in awarding an attorney award predicated upon one-third of the jury award.

Beyond the mathematics of the judgment, Plaintiff maintained that the trial court's award of attorney fees was fundamentally flawed. Plaintiff asserted that the awarded attorney fee translated into an hourly rate of $38.00. *Id.*, 13. The trial court rejected Plaintiff's argument that the attorney fee should not be calculated by multiplying the jury award by one-third. *Id.*, 15.

The trial court entered the judgment – the final order in this litigation – on January 9, 2013, from which Plaintiff filed her appeal to the Court of Appeals.

The Court of Appeals majority acknowledged that the trial court "did not begin its analysis of plaintiff's attorney fee award by multiplying a reasonable hourly rate by a reasonable number of hours." Opinion, 3, App. B. Indeed, this is understatement. As noted in the dissent,

> The trial court found that fees were warranted because USAA's failure to pay the awarded PIP benefits was unreasonable. But rather than considering Shulman's proposed hourly rate and the number of hours he allegedly invested, the trial court focused only on the verdict, observing that the jury awarded far less than the $200,000 to $400,000 that Shulman had requested.[1] Without citing any legal authority, the trial court ruled: "I'm going to give you one-third of [$]54,000. . . ." After adding the interest awarded (approximately $7,000), the trial court revised its calculations, determining that because Pirgu had obtained roughly $61,000 and one-third of that amount was "about $25,000," Shulman would be entitled to $25,000. [Dissenting Opinion, 2, App. C]

The majority held that the trial court was not "required to follow the *Smith* framework when assessing attorney fees," citing *Univ Rehab Alliance, Inc v Farm Bureau General Ins Co of Michigan*, 279 Mich.App. 691, 700 n 3, 760 N.W.2d 574 (2008). Opinion, 3, App. B. The dissent responded that *Wood* "necessitate[ed] remand for a true attorney-fee hearing." Dissenting Opinion, 1, App. C.

This application for leave to appeal follows.

STANDARD OF REVIEW

The standard of review is abuse of discretion. "[A]n abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Augustine v. Allstate Ins Co,* 292 Mich.App. 408, 424, 807 N.W.2d 77 (2011). Where the trial court fails to perform an attorney fee analysis pursuant to *Smith v. Khouri*, 481 Mich. 519, 751 N.W.2d 472 (2008), this Court will find an abuse of discretion.

LAW AND ARGUMENT

IN ASSESSING THE NO-FAULT ATTORNEY FEE, THE TRIAL COURT ENGAGED IN NO GENUINE REVIEW OF THE HOURS EXPENDED AND NO GENUINE REVIEW OF THE APPLICABLE HOURLY RATE. INSTEAD, THE TRIAL COURT AWARDED AN ATTORNEY FEE THAT WAS ONE-THIRD OF THE JURY AWARD.

THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO APPLY THE CRITERIA DEMANDED BY MICHIGAN LAW TO DETERMINE THE NO-FAULT ATTORNEY FEE.

The trial court awarded attorney fees based upon the computation: one-third of the jury award. In so doing, the trial court simply ignored Michigan law regarding the methodology for determining attorney fees.

In *C & D Capital, L.L.C. v Colonial Title Co.*, unpub. per curiam opinion (Mi.Ct.App. No. 306927, 5/23/13, App. D), the court awarded attorney fee sanctions pursuant to MCR 2.114(E) and MCL 600.2591. The court held that the trial court "failed to make the requisite findings to permit meaningful appellate review of the court's decision." Accordingly, the court "vacate[d] the determination of the amount awarded and remand[ed] for further proceedings." The court then explained the manner in which attorney fees are determined.

The analysis begins by determining the proper hourly rate and the hours billed.

> The party requesting an award of attorney fees bears the burden of proving the reasonableness of the fees requested. *Adair v. Michigan (On Third Remand),* 298 Mich.App 383, 391; 827 NW2d 740 (2012). If a factual dispute exists over the reasonableness of the hours

> billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence. *Smith v. Khouri,* 481 Mich. 519, 532; 751 NW2d 472 (2008). [*Id.*, sl op 6; internal quotation marks omitted, App. D.]

The court explained that disputes regarding the attorney fee are properly resolved utilizing the six factors set forth in *Wood v. Detroit Auto Inter–Ins Exch,*, 413 Mich. 573, 588, 321 N.W.2d 653 (1982), as well as the eight factors listed in MRPC 1.5(a), noted by *Smith v. Khouri,* 481 Mich. 519, 530, 751 N.W.2d 472 (2008).

Importantly, as the court noted, *Smith* explained that the trial court "should begin its analysis by determining the fee customarily charged in the locality for similar legal services." *Id.*, sl op, 7. "This number should be multiplied by the reasonable number of hours expended in the case." *Id.*, App. D (citation and internal quotation marks omitted).

> The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. [*Id.*; citation and internal quotation mark omitted.]

After contemplation of the "starting point," the trial court may consider other factors that may bear upon the appropriate attorney fee. However, there can be no doubt that the trial court must consider the hours expended in the litigation and the hourly fee.

Here, Plaintiff submitted detailed billing records demonstrating the hours expended in the litigation.[5] Plaintiff's attorney proposed an hourly rate of $350.

Defendant responded.[6] Defendant asserted that no attorney fee should be awarded because the denial of no-fault benefits was not unreasonable. (Defendant's brief, p. 15) (No cross-appeal was filed on that issue.) Additionally, Defendant asserted that the fees were excessive or unsupported. (Defendant's brief, p. 21) Pertinent to this appeal, Defendant extensively discussed *Smith v Khouri*, *supra*, and *Augustine v Allstate Ins.*, 292 Mich.App. 408, 806 N.W.2d 77 (2011). Defendant explained to the circuit court that *Augustine* placed great emphasis upon the Michigan Bar Journal data regarding attorney fees. Additionally, Defendant attached its Ex. E, State Bar Economics Survey.[7]

And yet the trial court gave no consideration to the hours expended and no consideration to the appropriate hourly rate. The harm was substantial. Suppose that the trial court deemed only 85% of the hours reasonable and necessary (a significant deduction). And, suppose that the trial court utilized the rate for the

[5] Plaintiff's Nov. 27 Motion, *supra* (to which Plaintiff attached Ex 3, comprising (1) Affidavit of Richard Shulman, attesting, "The time involved in handling the litigation aspect of this case alone exceeded 615.50 hours that I billed as set forth in the attached billing statement," and 11 pages of a spreadsheet describing the time expended on this cause of action.)

[6] Defendant's Response to Plaintiff's Motion for Entry of Judgment, Motion for Judgment notwithstanding the Verdict, Motion to Strike Jury Question Relating to Future Benefits, Motion for Costs, Attorney Fees and Interest, dated December 11, 2012.

[7] 2010 Economics of Law Practice: Attorney Income and Bill Rate Summary Report (Jan 2011).

25th percentile, years in practice of 16-25 years; the hourly rate is $185.[8] (**This is merely a hypothetical, entirely at odds with Plaintiff's actual submissions regarding hours and applicable hourly wage.** Plaintiff's attorney vigorously asserts that he is entitled to be compensated for all hours worked at an hourly rate in the 75th percentile.) On these assumptions, the appropriate attorney fee is $91,094, almost four times the attorney fee awarded by the trial court. Of course, using the median or the average fee for an attorney of 16-25 years' experience, the appropriate hourly fee is $228 or $255. Thus, again applying the rate to only 85% of the hours, the attorney fee would be $119,283.90 (median hourly rate) or $133,409.62 (average hourly rate).

Moreover, an hourly rate for personal injury (plaintiff) lawyers offering a contingent fee contract understates the appropriate hourly fee because a contingent fee must expect to earn $0 on a fair percentage of litigated cases. Accordingly, the contingent fee practitioner should be awarded a higher hourly rate to compensate for the expected zero-recovery cases. (And, indeed, see footnote 6 indicating that the 25th percentile rate is $225.)

[8] For Oakland County lawyers south of M-59, the 25th percentile rate is $190. For all Personal Injury (plaintiff) lawyers, the 25th percentile rate is $225.

None of the adjustments and fine-tuning discussed in *Wood v DAIIE*, 413 Mich. 573, 321 N.W.2d 653 (1982), are genuinely pertinent to this appeal.[9] In this case, the circuit court simply ignored Michigan law in arriving at the attorney fee award. In *Augustine*, this Court vacated an attorney fee award for rehearing and redetermination because *Smith* was not properly applied.

Also, in *Prins v Michigan State Police*, 299 Mich.App. 634, 831 N.W.2d 867 (2013), the court vacated the trial court's attorney fee award. The court noted, "Essentially, there is no attorney-fee analysis at all—let alone an analysis pursuant to *Smith*—for this Court to conduct a meaningful review of the circuit court's attorney-fee determination." The court noted, "*Smith* explicitly requires trial courts to briefly address each of the *Smith* factors when reaching its decision to aid appellate review; the circuit court did not do so in this case." Notably, *Prins* pertained to an attorney award under the Freedom of Information Act's (FOIA) subsection on attorney fees, MCL 15.240(6). The court noted:

> Our Supreme Court subsequently [subsequent to *Woods*] issued an order reversing a decision of this Court in a FOIA case and remanded the case to the circuit court to determine the plaintiff's reasonable attorney fees pursuant to the factors set forth in *Smith. Coblentz v. City of Novi,* 485 Mich. 961, 774 N.W.2d 526 (2009). Accordingly, although *Smith* is not a FOIA case, it controls for purposes of determining

[9] No doubt, Defendant will argue that Plaintiff did not achieve the hoped-for outcome. In this vein, see *Tinning v Farmers Ins. Exch.*, 287 Mich.App. 511, 791 N.W.2d 747 (2010), affirming the attorney fee award of $57,690, although the jury verdict was only $1,235 (benefits) and $218.95 (no-fault interest).

> reasonable attorney fees in FOIA cases, including plaintiff's reasonable attorney fees in this case. *Id.*[10]

Here, also, the trial court did not address the *Smith* factors; there was no analysis as contemplated by Michigan law.[11] Plaintiff urges this Court to vacate the trial court's award of attorney fees and remand for reevaluation pursuant to *Smith*.

Judge Gleicher, in her dissent, discussed in detail the history and rationale of the No-Fault Act provision for attorney fees. Her analysis is noteworthy.

Judge Gleicher explained that the No-Fault Act reflects the Legislature's decision to "highly regulate Michigan's no-fault insurance business." Dissenting Opinion, 5, App. C. When benefits are due, the insurer is required to promptly make payment or be charged no-fault interest. An unreasonable failure to pay leads to the imposition of attorney fees. *Id.* Because the Act is remedial, its provisions must be liberally construed in favor of the insured. *Id.*, 6.

In *Wood*, this Court "adopted specific guidelines for determining a 'reasonable attorney fee.'" *Id.* Judge Gleicher opined "that in making a fee-reasonableness determination, a court should draw on the factors set forth in

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[10] See *Coblentz v Novi*, 485 Mich. 961, 774 N.W.2d 526 (2009).

[11] No doubt, Defendant will refer this Court to the hearing on January 19, 2013. This hearing was well after the trial court had decided to award a fee equal to one-third of the jury award. At this juncture, the trial court appeared to perceive that the court had engaged in no analysis regarding the attorney fee award. The trial court's remarks at this juncture focused on relatively insignificant details; the point remains that the trial court never commenced its analysis by reference to statistical data on hourly attorney fees and the hours expended in the litigation.

MRPC 1.5(a), as described by the Supreme Court in *Smith*." *Id.* She perceived "no meaningful difference between assessing attorney fees as case evaluation sanctions, and assessing them as sanctions for unreasonably denied or delayed payment of PIP benefits." *Id.*, 6, n. 2, App. C.

Judge Gleicher reviewed three reasons to apply the *Wood* or *Smith* factors rather than simply award the contingent fee:

> 1. A "claimant usually has no alternative but to resort to a contingency-fee legal arrangement when an insurer unreasonably denies paying benefits" * * * "Despite the ubiquity of the contingency-fee arrangement in such cases, neither this Court nor the Supreme Court has ruled that a trial court may avoid the necessity of an attorney-fee hearing (or a reasonable equivalent) by simply dividing the judgment amount by three." *Id.*, 7, App. C.
>
> 2. "Second, the dollar amount of the first-party no-fault benefits at issue may be relatively small. * * * "The act's attorney-fee provision provides attorneys an incentive to undertake cases involving small claims that nonetheless loom large to the injured party." Although the contingency fee may be minimal, "MCL 500.3148(1) incentivizes lawyers to undertake representation they could otherwise not afford, at the same time encouraging insurers to carefully consider benefit decisions." *Id.*
>
> 3. "Third, the vindication of small claims may require the investment of substantial attorney time. As an example, if there is a debate "whether the claimed PIP benefits relate to an accident or a preexisting condition, a claimant may be required to present extensive expert testimony spanning many years of treatment. In such a case, the contingent-fee attorney not only risks coming away empty handed despite a significant time investment, but necessarily incurs substantial expenses in the preparation and litigation of the case." *Id.*

Fundamentally, as with many statutory grants of attorney fees, the Legislature sought to motivate an attorney to represent a claimant, notwithstanding that the ordinary fee might be inadequate absent the legislative fiat.

It is useful to consider a claim where an insurance carrier refuses to pay $8,000 in medical bills and presents a colorable (but ultimately meritless) argument that the medical condition is unrelated to the accident. An uncooperative insurer will automatically prevail; there will be no representation; and there will be no litigation – unless the Legislative mandate is enforced, permitting an attorney fee based on a reasonable hourly rate multiplied by hours necessarily expended.

Judge Gleicher noted, *id.*, 7-8, n. 3, App. C, "In analyzing other statutory attorney-fee provisions, our Supreme Court has never approved a contingency-fee shortcut approach. See *Michigan Dep't of Transp v Randolph*, 461 Mich 757, 766; 610 NW2d 893 (2000) ('[W]e reject defendants' argument that a one-third contingency fee is presumptively reasonable.')" In *Coblentz v. Novi,* 485 Mich. 961, 774 N.W.2d 526 (2009), a FOIA suit, this Court peremptorily "REMAND[ed] this case to the Oakland Circuit Court for a re-determination of the plaintiffs' reasonable attorney fees pursuant to the factors set forth in *Smith v. Khouri,* 481 Mich. 519, 751 N.W.2d 472 (2008)." Similarly, here, Plaintiff respectfully submits that this Court should peremptorily reverse the Opinion of the majority, adopt the Dissenting Opinion,

and remand this matter to the trial court for a determination of attorney fees pursuant to the *Smith* factors.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant LINDITA PIRGU, Guardian and Conservator of the Estate of Feridon Pirgu, a Legally Incapacitated Individual, by and through her attorneys, Law Office of Richard M. Shulman and Richard E. Shaw, respectfully prays that this Court grant her Application for Leave to Appeal and pursuant thereto reverse the Court of Appeals majority Opinion and the trial court's Judgment regarding attorney fees, and remand to the trial court for determination of proper no-fault attorney fees. Alternatively, Plaintiff-Appellant requests that this Court peremptorily remand this case to the trial court for a re-determination of the plaintiffs' reasonable attorney fees pursuant to the factors set forth in *Smith v. Khouri,* 481 Mich. 519, 751 N.W.2d 472 (2008).

Respectfully submitted,

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